BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JESSE JOHN FLORES JR.
Claimant
VS.

CAMERON DRYWALL
Respondent
AND

FARMERS ALLIANCE MUTUAL INSURANCE
Insurance Carrier
AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 152,948

ORDER

ON the 18th day of November, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Steven J. Howard dated October 21, 1993, and the Nunc Pro Tunc Order dated October 21, 1993, came on for oral argument by telephone conference.

APPEARANCES

The claimant appeared by his attorney, J. Paul Maurin, of Kansas City, Kansas. The respondent and its insurance carrier appeared by their attorney, Timothy G. Lutz, of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, James Lugar, of Kansas City, Kansas. There were no other appearances.

RECORD

The record before the Appeals Board is the same as that considered by the Administrative Law Judge as specifically set forth in the Award dated October 21, 1993.

STIPULATIONS

The stipulations set forth by the Administrative Law Judge in his Award dated October 21, 1993, are hereby adopted by the Appeals Board for purposes of this order.

ISSUES

(1) Whether claimant sustained an accidental injury or a series of accidental injuries arising out of and in the course of his employment with respondent for the period of May, 1989 through August 1, 1990.

(2) Whether respondent received notice of said accidental injuries or, if not, did prejudice result.

(3) Whether the relationship of employer and employee existed between the parties on the dates alleged.

(4) Whether the parties are covered by the Kansas Workers Compensation Act.

(5) Whether timely written claim was received.

(6) The claimant's average weekly wage.

(7) Claimant's entitlement to temporary total disability benefits.

(8) Claimant's entitlement to medical expenses including unauthorized, past, and future medical expenses.

(9) The liability of the Kansas Workers Compensation Fund herein pursuant to the stipulations of the parties.

(10) The nature and extent of claimant's disability, if any, resulting from his alleged occupational accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) Whether claimant sustained an accidental injury or a series of accidental injuries arising out of and in the course of his employment with respondent for the period of May, 1989 through August 1, 1990.

Claimant met with personal injury by a series of repetitive traumas from May 1, 1989 through August 1, 1990.

Claimant is a drywall finisher. His job duties include applying tape and mud to drywall, occasionally hanging drywall. This job requires him to erect and climb scaffolding, wear stilts for overhead work, stoop, bend, twist, squat and kneel. He also carries buckets of water and plaster weighing up to fifty pounds and above. He generally worked eight to twelve hour days usually three to four consecutive days and then would be off for a period of days before beginning another job.

Claimant had a prior workers compensation claim in Missouri for an injury to his left knee in 1983 or 1984 which was settled. Following the settlement he continued working as a drywall finisher. He began working for the respondent in 1985 or 1986. In late May or early June of 1989 claimant started having complaints of continuous ache and pain in his knee or knees when he did certain types of work. His complaints would subside when he had some time off work.

In 1989 he returned to the doctor that had treated him for his prior knee problems in 1983 or 1984. Dr. Joyce recommended physical therapy and referred claimant to a

sports rehabilitation facility. Claimant did not complete this treatment because of the cost. From May or June, 1989 until March, 1990 claimant testified that his knee condition was stable, hurting most of the time that he worked. He took pain pills and tried to live with the pain. He was able to work full time and perform all of his job duties. In March of 1990 there was an incident where claimant was attempting to move a barrel of water from the back of a pickup truck to a house by "walking" it across some boards. He lost control of the barrel and fell from the back of the pickup truck to the ground landing on both feet. This incident caused increased symptoms to his knees. After March, 1990 it became increasingly difficult for the claimant to work his usual hours. He gradually reduced his work day due to pain to the point where he was not able to work in excess of four hours a day. Eventually he was forced to terminate his employment due to his not being able to keep up with the work that was required of him. Claimant's last day worked was in August of 1990.

Claimant initially filed a claim alleging injury "first part of March 1990, and every day he worked thereafter". This claim was subsequently amended after it was discovered that claimant had sought medical treatment in 1989 for knee complaints. Respondent argues that the claimant has not met his burden of proof due to the inconsistent histories he has given concerning his accidental injury. Although claimant consistently testified to having injured the right knee by virtue of the incident in March, 1990 when lifting the 55 gallon barrel of water, his application for hearing alleged injury by falling against a scaffold. The medical histories taken by the various physicians also contain substantially different information. Nevertheless, the Appeals Board finds that the evidence taken as a whole supports a conclusion that the claimant suffered personal injury by a series of repetitive traumas to both knees culminating in August of 1990 when he was no longer able to continue work due to pain. For purposes of this award the claimant's date of accident will be found to be August 1, 1990.

(2) Whether respondent received notice of said accidental injuries or, if not, did prejudice result.

Claimant testified that there were no witnesses to the March, 1990 accident with the 55 gallon barrel but that his brother, Jim Flores, owner of the respondent company was at the job site. Claimant testified that after falling from the pickup truck he told his brother of the incident and advised him that his knees hurt. Jim Flores asked claimant if he could finish the day to which the claimant replied in the affirmative. The brother then assisted claimant with the barrel in getting it into the house under construction. There was testimony from Linda Harris, a cousin of Jim and Jesse Flores, who was also a secretary for Kodiak Contractors, a business owned by Jim and Jesse Flores' father and which at that time shared the same office space with respondent. This testimony concerned a telephone call from claimant or claimant's wife to Jim Flores on or about January of 1991 supporting the claimant's assertion that respondent was aware that an injury resulted from the March, 1990 incident.

The brother admitted in his testimony that he recalled assisting claimant with the 55 gallon drum and recalled a subsequent telephone call from claimant relating his knee problems to that incident. Claimant testified that his brother knew about the subsequent deterioration of the condition of claimant's knees because his brother would repeatedly complain about claimant not getting his work done whereupon the claimant would tell his brother that his knees were killing him and that he needed help.

The Appeals Board finds that respondent did have notice of knee injury on repeated

occasions during the period of March, 1990 through August, 1990. Although the claimant did not make it clear that he was relating his problems after March, 1990 to any specific accident at work, the Appeals Board finds that no prejudice resulted to the employer from any such lack of notice. See Pike v. Gas Service Co., 223 Kan. 408, 573 P.2d 1055 (1978).

(3) Whether the relationship of employer and employee existed between the parties on the dates alleged.

Respondent alleges that claimant was not an employee of Cameron Construction but was an independent contractor. Jim Flores testified that when he had work available he would call his brother, Jesse, and offer him work which Jesse was free to accept or reject. Claimant was permitted to set his own hours and perform the job according to his own methods. Jim Flores only inspected the finished product. Claimant furnished his own tools and equipment and was paid by the job rather than hourly and no taxes were withheld from his pay.

Claimant disputed the testimony of respondent in several respects. Claimant testified that he was paid on a square-foot basis and that he would see his brother every day while working. His brother would tell him what jobs to do and what order to do them. He would also tell the claimant when the work was to be done. The claimant admitted that he provided his own hand tools but maintained that the respondent provided certain tools including an acoustic spray machine. The respondent had the right to control how the work was done and the right to terminate claimant at any time. In addition, several paychecks were introduced into evidence which showed taxes and other withholding from the claimant's checks. It was claimant's testimony that his brother, Jim Flores, would tell him what jobs he wanted him to do, what specific things he wanted done on each job and that occasionally he would take claimant from one job to another. Claimant never bid jobs but was paid on a square-foot basis. Claimant testified that Cameron was a subcontractor and had to provide its general contractor with a certificate of workers compensation insurance. Claimant testified that he very rarely worked for anyone but his brother since starting work for Cameron in 1985 or 1986. Claimant stated he was paid at the end of the job and would be paid additionally by the hour for repair work.

"[A]n independent contractor is one who, in the exercise of an independent employment, contracts to do a piece of work according to his own methods and who is subject to his employer's control only as to the end product or final result of his work." Krug v. Sutton, 189 Kan. 96, 366 P.2d 798 (1961)

"On the other hand, an employer's right to direct and control the method and manner of doing the work is the most significant aspect of the employer-employee relationship, although it is not the only factor entitled to consideration. An employer's right to discharge the workman, payment by the hour rather than by the job, and the furnishing of equipment by the employer are also indicia of a master-servant relation." Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965).

It is the opinion of the Appeals Board that this combination of facts clearly establishes that claimant was an employee. Payment by the hour for certain work rather than by the completed project and the furnishing of certain tools are both indicia of an employment relationship. McCarty v. Great Bend Board of Education, 195 Kan. 310, 403 P.2d 956 (1965). The fact that claimant would ask Jim Flores for help, if needed, also suggests he was not acting as an independent contractor. See Shindhelm v. Razook, 190

Kan. 80, 372 P.2d 278 (1962); Schroeder v. American Nat'l Bank, 154 Kan. 721, 121 P.2d 186 (1942). Although not expressly addressed in the evidence, the above facts also show a relationship which would be subject to termination at any time. As the Kansas Supreme Court observed in Jones v. City of Dodge City, the ability to terminate the relationship at any time is strong evidence of a right to control which exists in the employment rather than independent contractor relationship.

Kansas appellate courts have repeatedly indicated that right to control the method of performing the work is the primary consideration in determining whether an employment relationship exists for purposes of the workers compensation coverage. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976); Evans v. Board of Education of Hays, 178 Kan. 275, 284 P.2d 1068 (1955). The right to control, not the actual exercise of control, is determinative. See Anderson v. Kinsley Sand & Gravel, supra; Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966).

Kansas cases do indicate that in order to be significant, the right to control must be a right to control the method or means by which the work is performed, not simply control over the result to be achieved. See Evans v . Board of Education of Hays, supra. The distinction, sometimes described as a distinction between control over the details as opposed to control over the result, is often difficult to make in a meaningful way. See Larson, Workmen's Compensation Law, Vol. 1B, Sec. 43.52 (1993).

In this case claimant was asked directly if the methods of performing the work was his decision alone. His testimony illustrates the relationship. He answered:

> "Q. A minute ago you indicated that Jim Flores, your brother, you answered to him. What did you mean by "answer to him"?
>
> A. Well, he would tell me what jobs he wanted me to do and what specific things he wanted done on each job. Occasionally he would come and take me from this job to another to do a specific thing. I may have to go do a repair job for him somewhere that had to be done right away." (Jesse Flores deposition, page 6)
>
> "Q. He didn't tell you how to perform the work, he left that up to you because you had experience and knew how to do the work, didn't you?
>
> A. That's not always the case, no.
>
> Q. That's typically the case, isn't it?
>
> A. No, he would come out on each job and tell me exactly what he wanted and how he wanted it done or how he wanted it finished, and maybe occasionally he said, "I have to have this room done first so they can do this while you're doing the rest of it." (Jesse Flores deposition, page 38.)

There are some facts or factors presented by the evidence in this case which might suggest an independent contractor relationship. Claimant set his own hours and used some of his own tools. It was not clear how long the respondent was withholding taxes. He testified that Jim Flores did not always tell him how to do his job or inspect his work. These facts do not, in the Appeals Board's opinion, override the other factors.

Finally, as initially indicated, a finding that claimant was an independent contractor is inconsistent with the function of the Workers Compensation Act and purpose for the distinction as to employment status. The Workers Compensation Act is intended to spread the financial burden of on the job injuries to consumers generally by routing it through employers as a cost of doing business. See Larson, Workmen's Compensation Law, Vol.

1B, Sec. 43.52 (1993). Consistent with that purpose, the distinction between an employee and an independent contractor should depend in part upon whether it is reasonable to expect the purported independent contractor to carry the burden of the risk. In this case, claimant's relationship with the respondent and the activities in which he was engaged do not indicate it would be reasonable to expect claimant to assume this burden and for that additional reason claimant should not be considered an independent contractor.

(4) Whether the parties are covered by the Kansas Workers Compensation Act.

The Appeals Board agrees with the finding of the Administrative Law Judge on this issue and adopts his findings of fact and conclusions of law as if specifically set forth herein. It is clear from the undisputed testimony of claimant as to his earnings that the respondent had a total gross annual payroll in excess of $10,000 per year, that the claimant was injured in Kansas, and that most of the respondent's work was performed in Kansas. K.S.A. 44-505.

(5) Whether timely written claim was received.

K.S.A. 44-520a(a) provides:

> "No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident."

In addition, K.S.A. 44-557 provides for up to one year to file for written claim for compensation where, as here, no employer's report of accident has been filed. The evidence in this case reflects that the claimant made an unsuccessful attempt to serve written claim upon the employer on March 1, 1991, by certified letter to the residence address of Jim Flores which was returned unclaimed. A second certified letter to respondent dated April 23, 1991, was received by Jim Flores. The records of the Kansas Division of Workers Compensation introduced by the claimant shows that claimant filed a claim for compensation with the Division on March 4, 1991. Claimant testified that the address to which the certified letters were directed was both the residence and business address of Jim Flores. The respondent acknowledged residing at that address although he indicated that in March and April of 1991 he also lived in Taney, Missouri and was back and forth between those addresses. He does not recall receiving written claim but knows that if he did receive a claim he probably read it, put it aside and took no action on it. As claimant initially filed his claim with the State of Missouri, claimant put into evidence an answer filed on behalf of Cameron Drywall in the Missouri proceeding on November 4, 1991 bearing a date of May 24, 1991. This further evidences the fact that respondent or an agent of respondent received the April 23, 1991 written claim. As stated in Ours v. Lackey, 213 Kan. 72, 81-82, 515 P.2d 1071 (1973), "The written claim may be presented in any manner and through any person or agency. The claim may be served upon the employer's duly authorized agent."

Respondent argues that the two hundred (200) day limitation of K.S.A. 44-520a(a)

is applicable because respondent did not receive notice of accident and that therefore, the one year provision of K.S.A. 44-557 would not come into play as the employer cannot be require to file a report of accident for an injury of which it had no notice. However, as discussed above, the Appeals Board finds that the respondent did have notice of accident. Accordingly, the one year limitation of K.S.A. 44-557 is applicable. Respondent was served with written claim within one year of August 1, 1990 and thus timely written claim was made.

(6) The claimant's average weekly wage.

The Administrative Law Judge found claimant's average weekly wage to be $800.00 per week based upon what was described as claimant's unrefuted testimony. Claimant testified that he was paid eight cents per foot by Cameron and that he averaged around $800.00 per week. This figure was not explained in relation to any particular period of time during the claimant's approximately four or five years of employment. Claimant testified that he worked eight to twelve hours a day prior to March, 1990. After March, 1990, he only worked eight hours a day or less and by August, 1990 he was only working four hours a day. Generally, he would work three to four days at a time and there would be a lapse of two or three days sometimes up to a week between jobs. Respondent disputes claimant's wage estimate but offers no evidence in support of another figure. Accordingly, the Appeals Board finds that the undisputed evidence establishes an average weekly wage of $800.00 per week. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

(7) Claimant's entitlement to temporary total disability benefits.

The Administrative Law Judge found claimant to have been temporarily totally disabled from August 1, 1990, when he left work with respondent through to May 28, 1991, when the claimant was released to work by Dr. Pawsat.

Claimant testified that he saw Dr. Joyce a few weeks or a month after he quit his job with the respondent. Claimant testified that Dr. Joyce told him not to go back to work as a drywall finisher. He, therefore, remained off work until his release by Dr. Pawsat in May of 1991. Dr. Pawsat imposed restrictions of no working on scaffolding, ladders or stilts. Thus, claimant could not return to his former employment of a drywall finisher. He has worked occasionally since being released by Dr. Pawsat doing general carpentry and plumbing.

Respondent denies claimant quit working in August of 1990 because of his physical condition. Rather, respondent alleges that there was a general slowdown in jobs and that he simply had no more work for claimant to do.

The Appeals Board finds that the weight of the credible evidence supports a finding that the claimant was temporarily totally disabled at least until his release by Dr. Pawsat on May 28, 1991.

(8) Claimant's entitlement to medical expenses including unauthorized, past and future medical expenses.

As the Appeals Board has found claimant sustained a compensable injury he is, therefore, entitled to medical benefits pursuant to K.S.A. 44-510 and unauthorized medical

expense not to exceed to $350.00 for the services of Dr. Overesch. Future medical could be awarded upon proper application to the Director. All medical expenses for treatment related to the knee injuries are compensable.

(9) The liability of the Kansas Workers Compensation Fund herein pursuant to the stipulations of the parties.

The Appeals Board has been advised that a stipulation has been entered into between the respondent and the Kansas Workers Compensation Fund whereby the Fund will be responsible for seventy percent (70%) of the costs associated with any award of compensation to claimant. The Appeals Board finds that the Fund should be and is ordered responsible for seventy percent (70%) of the cost of this award pursuant to said stipulation.

(10) The nature and extent of claimant's disability, if any, resulting from the alleged occupational accident.

Claimant's medical history as to his knees is relevant to this issue. The record in this case reflects that Steven T. Joyce, M.D., performed a diagnostic arthroscopic procedure to claimant's left knee on October 25, 1984. He diagnosed a complex tear of the posterior medial meniscus and a grade one insufficiency of the interior cruciate ligament. There is no indication of any injury or treatment to the right knee at that time. This left knee injury was sustained while claimant was working for a company owned by his father. His brother, Jim Flores, worked there as well and was aware of the injury. Claimant was last seen by Dr. Joyce for that left knee injury on November 26, 1984, and claimant was released to his regular job duties on December 12, 1984.

As a part of the workers compensation proceedings in Missouri, an independent medical examination was performed by Nathan Schechter, M.D., on March 6, 1985. Dr. Schechter testified that he performed an examination of the claimant only and did not provide any treatment. His records reflected that claimant suffered injury to his left knee due to an accident of October 18, 1984, while in the employment of M and F Drywall and that claimant returned to his former job duties the latter part of December, 1984. At the time of his examination the claimant had complaints of aching in the left knee which were aggravated by working and had occasional swelling. Physical examination revealed some crepitation in the left knee and the claimant could not squat fully. The claimant reported pain in left knee when he arose from the squatting position. Dr. Schechter felt this showed that claimant still had some internal derangement of the knee although x-rays were normal. He opined that the claimant would develop traumatic arthritis. He gave a functional impairment rating of fifteen to twenty percent (15-20%) to the left lower extremity and imposed permanent work restrictions of no climbing on ladders, not to be on stilts for a prolonged period of time and no prolonged squatting or bending. Claimant testified that he never saw Dr. Schechter's report from this examination and was never made aware of those restrictions. The record reflects that claimant did not again seek treatment for his knees until June 13, 1989, when he returned to Dr. Joyce with complaints of pain in both knees and hips, achiness, weakness, and crepitation. At that time x-rays showed a narrowing of the knee cap groove space indicating wear and tear of the knee cap. Dr. Joyce noted muscle weakness bilaterally and recommended physical therapy. The therapist subsequently recommended discontinuing physical therapy because of patella pain whereupon Dr. Joyce recommended an arthroscopic examination of the right knee. He suspected a degenerative tear of the meniscus with chondromalacia of the patella. He opined that this condition was due to micro-traumas and tearing from repetitive kneeling,

squatting, pivoting and twisting aggravated by using stilts, ladders and in general, doing drywall type work.

Claimant next saw Dr. Frank Jones on October 24, 1990, who in turn referred him to Dr. Robert Littlejohn, an orthopedic surgeon. Dr. Littlejohn saw claimant on December 4, 1990. He testified that he did not consider the x-rays of the knees to be significant and that there were minimal findings on physical examination. His diagnosis was a bilateral knee arthralgia with possible internal derangement. An MRI was ordered which was equivocal in nature. He ordered physical therapy and work hardening. Dr. Littlejohn does not know if his recommendation was followed as he never saw the patient again. Dr. Littlejohn noted that claimant related having injured himself in November of 1984 with no mention of subsequent injury. The history also described knee and hip pain becoming so severe that the claimant has been unable to work for about the past four months. The claimant described the 1984 surgery as having helped for two or three years then he started having trouble again to the point where he now has constant knee pain. Dr. Littlejohn testified that he prescribed a knee brace. He assumed that Dr. Schechter's restrictions were temporary in nature and that Dr. Schechter's concern with claimant's use of ladders and stilts would be if the activity was painful to the claimant. Squatting is of more concern because it is easy to injury a knee if twisted while squatting. Dr. Littlejohn considered it logical that the work activity of a sheetrock finisher would more likely cause knee problems than would the normal activity of day to day living. It was the opinion of Dr. Littlejohn that claimant's work activities did aggravate his knee problems. In his opinion, the everyday job duties of claimant aggravated, accelerated, and intensified the preexisting knee condition.

Claimant saw Dr. Federico Adler, a board certified orthopedic surgeon, on November 5, 1990, with a history of injury to the left knee at work in 1983. Since that time he has been experiencing progressive problems in both knees. On physical examination Dr. Adler found full range of motion with no crepitus, instability, looseness or tenderness. Claimant had complaints of persistent pain exacerbated by standing and walking and reported instances of the knee giving away. There was no mention of a new work related injury or a March, 1990 accident.

Claimant first saw Dr. Pawsat on February 7, 1991. He continued to treat with Dr. Pawsat until November 17, 1992. Dr. Pawsat's records, reflected the history of knee problems in excess of one year but there was no mention of a March, 1990 injury to the right knee until after Dr. Pawsat performed knee surgery in February of 1991. Dr. Pawsat testified that the claimant made a statement to the effect that he had had no problems with the left knee following the surgery in 1984 until March, 1990. The claimant's first mention of the March, 1990 accident was during the February 25, 1991 office visit. When Dr. Pawsat last examined the claimant on November 17, 1992, at the request of the respondent, the claimant reported constant pain and stiffness in both knees, more so in the right, which was aggravated by weather, stair climbing, ladder climbing, squatting, kneeling and lifting. Dr. Pawsat also noted complaints in the hips. He related the right knee problems to the March, 1990 accident, which also aggravated the left knee. He opined that the claimant's present symptoms in the left knee were a natural progression of symptoms from the 1983 injury. He did not feel the claimant had suffered a permanent disability to the left knee from the March, 1990 accident but did sustain a torn meniscus in the right knee for which he performed surgery in 1991, although that may have been present in 1989. He rated claimant as having a fifteen percent (15%) functional impairment to the right lower extremity which, if you assume a March, 1990 accident, then one-half of that rating, or seven and one-half percent (7.5%) was due to the accident and the other

one-half, or seven and one-half percent (7.5%) was preexisting. He did not find any disability to the hips from the March, 1990 accident, finding this was instead preexisting. Although claimant had some disability to the left knee from the 1983 injury, he suffered additional disability as a result of the natural progression of the initial injury. However, he admitted that the more vigorous activity that claimant performed the faster, the knee would deteriorate. In his opinion, any activity would aggravate the condition but more so by vigorous activity such as the work of a drywaller, including working on stilts.

Dr. Overesch examined claimant on June 5, 1992, at the request of claimant's counsel. He took a history from the claimant of a right knee injury in March, 1990, while walking a 55 gallon barrel of water when he fell landing on both feet and injuring both knees. Subsequent MRI showed torn medial menisci in both knees, right medial patella plica and questionable partial tear of the posterior cruciate ligament. The arthroscopic surgery done on February 27, 1991, to the right knee by Dr. Pawsat confirmed a diagnosis of complex tear of the posterior horn of the medial meniscus for which a medialmeniscectomy of the right was performed with a moderate size medial suprapatellar plica being excised. Damage to the articular cartilage of the medial femoralcondyl of the right knee was apparent for which Dr. Pawsat performed a chondroplasty. Upon physical examination McMurray's test for internal derangement was positive in both knees. Dr. Overesch noted right quadracep muscle atrophy. He found a five percent (5%) impairment to the left knee from the March, 1990 accident, in addition to a fifteen percent (15%) preexisting impairment for a total impairment of twenty percent (20%) to the left knee. The right knee was rated at twenty-five percent (25%) from the March, 1990 accident. This would translate to a seventeen percent (17%) whole body impairment. He recommended claimant not return to work as a drywall finisher, avoid working on scaffolding, climbing on ladders, stilt walking and jobs requiring repeated squatting and kneeling. In the opinion of Dr. Overesch, the work claimant did after March, 1990 brought him to surgery and caused permanent injury by accelerating and aggravating his condition in both knees.

If the claimant is entitled to work disability, then the work disability should be determined upon a two-prong test. This test for determining permanent partial general disability is the extent, expressed as a percentage, to which the ability to perform work in the open labor market has been reduced and the ability of the worker to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation. Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990). Hughes does not mandate that a court use a specific formula to arrive at the extent of permanent disability; it does require consideration of the two factors stated above when computing the extent of permanent partial disability. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

The Appeals Board, as the trier of fact, has the ultimate decision concerning the extent and nature of the disability, and such decision must be based on the evidence presented. However, the trier of fact is not bound by the medical evidence presented in the case and has the responsibility of making its own determination. The trier of fact's function is to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212 (1991).

Claimant was seen by a vocational expert, Monty D. Longacre, who found claimant had sustained a fifty-three percent (53%) loss of ability to access jobs in the open labor market based upon the restrictions of Dr. Overesch and a forty-three percent (43%) loss of access to the open labor market based upon the restrictions of Dr. Pawsat. Assuming an $800.00 average weekly wage pre-injury and a post-injury earning capacity of $240.00, it was the opinion of Monty Longacre that claimant had suffered a seventy percent (70%) loss of ability to earn a comparable wage. It was also the opinion of Monty Longacre that the claimant's other physical and health problems including heart disease and diabetes would likely preclude the claimant from working altogether.

The respondent's vocational expert was Robert Miller. Mr. Miller took into consideration the preexisting restrictions by Dr. Schechter to find a zero percent (0%) loss of access to the open labor market. In the opinion of Mr. Miller, the claimant had similar restrictions pre-injury and post-injury such that there was no labor market loss.

Respondent argues for a finding of no work disability in excess of the functional rating should the claim be found compensable due to the fact that the claimant had similar work restrictions imposed prior to his subject injury as those which have been recommended following his injury with respondent herein. Under the facts and circumstances of this case, the Appeals Board finds this argument to be without merit. Under present law the claimant's return to the same employment as a drywall finisher following his 1983 injury would create a presumption of no work disability in the absence of its being to a scheduled member. He was able to perform the same work at a comparable or greater wage for approximately six years. The respondent's position could result in a claimant being denied compensation for work disability both for the first accident due to his return to same or similar employment at a comparable wage post-accident and again deny work disability for the subject accident due to the existence of similar prior restrictions. The fact that the claimant was able to work as a drywall finisher contrary to those restrictions for a period of approximately six years indicates in the opinion of the Appeals Board that those restrictions were inappropriate when given. It should also be remembered that those restrictions were not given by the treating physician but by an examining physician for purposes of a pending workers compensation claim. The trier of fact has the right and obligation to weigh the evidence and to determine the credibility of the witnesses, including the physicians who testify, and utilize that as a factor in making its decision. Crabtree v. Beech Aircraft Corp., 229 Kan. 440, 442, 625 P.2d 453 (1981). Furthermore, to give such consideration to prior restrictions as respondent suggests would have the undesired effect of discouraging injured workers from returning to work by further penalizing them if reinjured in doing so, beyond what is contemplated in the credit statute K.S.A. 44-510a and the presumption of functional impairment found in K.S.A. 1992 Supp. 44-510e(a). Although this would appear to be the result contemplated by the Kansas Court of Appeals in Miner v. M. Bruenger & Co., Inc., 17 Kan. App. 2d 185, 836 P.2d 19 (1992), the facts in this case are clearly distinguished from those in Miner. The Appeals Board does not accept the prior restrictions recommended by Dr. Schechter. The prior treating

physician, Dr. Joyce, who actually performed the initial surgery on claimant's left knee, released him to return to work as a drywall finisher.

The Administrative Law Judge, without saying so, appears to have followed the rationale of the district court as affirmed by the Court of Appeals in the Miner case in refusing to consider the testimony of Monty Longacre, because he did not consider the claimant's prior restrictions in reaching an opinion as to the loss of claimant's ability to obtain work in the open labor market and loss of ability to earn a comparable wage. Instead, the Administrative Law Judge adopted the position of Robert Miller and found no loss of access to the open labor market from the subject injury due to there having been restrictions imposed prior to the subject injury which were essentially the same as those being recommended now. The Appeals Board, as we said, distinguishes this case on its facts from the Miner case. In Miner, the district court as the trier of fact, found limitations and restrictions on the claimant's physical abilities which were attributable to the claimant's prior injury, said prior injury having been the subject of a compensable workers compensation claim for which claimant had received a lump sum payment for a permanent partial disability to the body as a whole. We find claimant not to have had a work disability following his first knee injury in 1983 or 1984. Instead, all of his work disability is found to be the result of injury which is the subject of this claim.

The evidence is now such that the claimant is unable to return to work as a drywall finisher as a result of a compensable work related injury. He has permanent restrictions which result in an actual loss of access to the open labor market and loss of ability to earn a comparable wage. The Appeals Board finds under the facts and circumstances of this case, taking the record as a whole, that the opinions of Monty Longacre are more credible than those of Robert Miller as Mr. Longacre does not factor in the prior restrictions which are properly not considered, where the claimant returned to the same or similar employment and was able to perform the required job duties for an extended period of time contrary to such restrictions and where the prior restrictions were not consistent as between the various treating and examining physicians. Giving equal weight to the similar restrictions of Dr. Overesch and Dr. Pawsat and giving equal weight to the loss of ability to access jobs in the open labor market and the claimant's loss of ability to earn a comparable wage, the Appeals Board finds claimant has sustained a work disability of fifty-nine percent (59%).

AWARD

WHEREFORE, AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR OF the claimant, Jesse John Flores, and against the respondent, Cameron Drywall, and its insurance carrier, Farmers Alliance Mutual Insurance, and the Kansas Workers Compensation Fund. The claimant is entitled to 43 weeks temporary total disability at the rate of $278.00 per week or $11,954.00 followed by 316.72 weeks at $278.00 per week or $88,046.00 for a fifty-nine percent (59%) permanent partial general body disability, making a total award of $100,000.00. As of January 28, 1994, there would be due and owing to the claimant 43 weeks temporary total compensation at $278.00 per week in the sum of $11,954.00 plus 139.43 weeks permanent partial compensation at $278.00 per week in the sum of $38,761.54 for a total due and owing of $50,715.54 which is ordered pain in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $49,284.46 shall be paid at $278.00 per week for 177.29 weeks or until further order of the Director.

FURTHER AWARD IS MADE that claimant is entitled to unauthorized medical expenses pursuant to Finding No. 8 above.

The claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid direct as follows:

METROPOLITAN COURT REPORTERS, INC.		
Transcript of Proceedings, Dated February 22, 1993		$ 75.00
Deposition of Robert Littlejohn, M.D., Dated April 20, 1993		$ 202.00
Deposition of Nathan Schechter, M.D., Dated April 21, 1993		$ 163.00
Deposition of Federico Adler, M.D., Dated April 27, 1993		$ 146.10
Deposition of John E. Pawsat, M.D., Dated April 28, 1993		$ 254.50
Transcript of Proceedings, Dated May 18, 1993		$ 69.00
Deposition of Steven T. Joyce, M.D., Dated July 9, 1993		$ 161.90
Deposition of Robert A. Miller, Dated July 20, 1993		$ 212.40
Deposition of James A. Flores, Dated August 17, 1993		$ 280.00
	TOTAL	**$ 1,563.90**
RICHARD KUPPER & ASSOCIATES		
Deposition of Harry B. Overesch, M.D., Dated December 2, 1993		$ 476.25
Deposition of Monty D. Longacre, Dated June 7, 1993		$ 327.80
Continuation of Regular Hearing, Dated June 16, 1993		$ 550.60
Deposition of Linda Harris, Dated July 12, 1993		$ 216.60
	TOTAL	**$ 1,571.25**

IT IS SO ORDERED.

Dated this _____ day of January, 1994.

_____
BOARD MEMBER

_____
BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

We concur with the conclusion reached by the majority in this case but would disagree with one aspect of the reasons given. The majority opinion suggests that the prior work restrictions would have, if shown to be legitimate, reduced the amount to be awarded. The majority concludes, however, that there is compelling evidence in this case that the prior work restrictions were not appropriate. We agree that the evidence tends to indicate those prior restrictions were not appropriate. We do not, however, consider it necessary to reach that issue.

The record indicates that claimant's injury was an aggravation of a preexisting condition. The Kansas Workers Compensation Fund stipulated that it would be responsible for seventy percent (70%) of any award entered. Kansas Appellate Courts have consistently held that an injury which aggravates a preexisting disability is fully compensable. The injured worker is entitled to compensation for the total resulting disability consisting of the preexisting disability and the disability caused by the aggravation. Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987); Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984); Hampton v. Professional Security Co., 5 Kan. App. 2d 39, 611 P.2d 173 (1980); Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978); Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976); Poehlman v. Leydig, 194 Kan. 649, 400 P.2d 724 (1965); Geurian v. Kansas City Power & Light Co., 192 Kan. 589, 389 P.2d 782 (1964); Hayes v. Garvey Drilling Co., 188 Kan. 179, 360 P.2d 889 (1961).

In cases involving aggravation of a preexisting disability, the decision to award the full disability, including the preexisting, appears to be required by other provisions of the Workers Compensation Act. There is, for example, no logical application for the credit provisions of K.S.A. 44-510a or the Fund liability provisions of K.S.A. 44-567 if the award is to be for the increase in disability only. Both statutes assume that the award on the subsequent injury will include the full disability, including the preexisting disability. The credit provision of K.S.A. 44-510e also expressly states that the credit ceases once the period covered by the prior award ends.

Cases involving work disability make, if anything, a more compelling argument for award of the full disability than do cases involving only functional impairment. In most work disability cases, the injury has left the worker unable to perform the job he or she had been performing. It is the new injury or aggravation which has caused those restrictions, new and old, to have immediate importance and impact on the claimant's life.

We do not consider the appellate court's decision in Miner v. M. Bruenger & Co., Inc., 17 Kan. App. 2d 185, 836 P.2d 19 (1992), to be controlling on this issue. The court

there found that it was not error for the Administrative Law Judge to exclude the report of an expert who had not considered prior restrictions. The court does not, however, explore the significance of prior restrictions and its decision in that case is not, in our view, persuasive authority for any particular treatment of prior restrictions.

There is in this case one additional self-sufficient reason why the prior restrictions should not be considered. Claimant's prior injury was to a scheduled member only. Although this claim was made in Missouri, had it been made in Kansas he would have been entitled to functional impairment only, not work disability. If an award in this case were to consider prior work restrictions, it would effectively deduct for a prior work disability to which he was not entitled in the first instance.

For the foregoing reasons it is our opinion that, in cases involving an aggravation of a preexisting disability, the prior work restrictions should not be considered in determining nature and extent of the claimant's disability.

BOARD MEMBER

BOARD MEMBER

cc: J. Paul Maurin, III, P.O. Box 1216, Kansas City, Kansas 66117
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Steven J. Howard, Administrative Law Judge
George Gomez, Director